

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DENNIS KITCHEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

Case No. ED CV 14-11-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On January 6, 2014, plaintiff Dennis Kitchen filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability and disability insurance benefits (“DIB”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

1 Plaintiff presents a single disputed issue for decision: whether the
2 Administrative Law Judge (“ALJ”) properly rejected the opinion of examining
3 physician Dr. John Branch. Memorandum in Support of Plaintiff’s Complaint (“P.
4 Mem.”) at 2-5; Memorandum in Support of Defendant’s Answer (“D. Mem.”) at 2-
5 6.

6 Having carefully studied, inter alia, the parties’s moving papers, the
7 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
8 that, as detailed herein, the ALJ properly discounted the opinion of plaintiff’s
9 treating physician by providing specific and legitimate reasons supported by
10 substantial evidence for doing so. The court therefore affirms the decision of the
11 Commissioner denying benefits.

12 II.

13 FACTUAL AND PROCEDURAL BACKGROUND

14 Plaintiff, who was fifty-six years old on his alleged disability onset date, is a
15 high school graduate. AR at 34, 136. He has past relevant work as a shipping and
16 receiving clerk and a material handler. *Id.* at 48.

17 On December 14, 2010, plaintiff filed an application for a period of
18 disability and DIB due to pain in his lower spine and numbness in his right leg.
19 *Id.* at 136, 164. This application was denied initially and upon reconsideration,
20 after which he filed a request for a hearing. *Id.* at 71-74, 76-81, 83.

21 On July 19, 2012, plaintiff, represented by counsel, appeared and testified at
22 a hearing before the ALJ. *Id.* at 29, 34-47. The ALJ also heard testimony from
23 Kristen Cicero, a vocational expert. *Id.* at 47-50. On September 14, 2012, the
24 ALJ denied plaintiff’s claim for benefits. *Id.* at 17-25.

25 Applying the well-known five-step sequential evaluation process, the ALJ
26 found, at step one, that plaintiff had not engaged in substantial gainful activity
27 since November 16, 2010, the alleged onset date. *Id.* at 19.

1 At step two, the ALJ found that plaintiff suffered from the following severe
2 impairment: disc disease of the lumbar spine. *Id.*

3 At step three, the ALJ found that plaintiff did not have an impairment or
4 combination of impairments that met or medically equal one of the listed
5 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the
6 “Listings”). *Id.* at 20.

7 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),¹ and
8 determined that plaintiff had the RFC to perform medium work with the following
9 limitations: lift/carry fifty pounds occasionally and twenty-five pounds
10 frequently; stand/walk for six hours in an eight-hour workday; sit for six hours in
11 an eight-hour workday; occasionally climb using ladders, ropes, and scaffolds; and
12 frequently climb using ramps and stairs. *Id.*

13 The ALJ found, at step four, that plaintiff was capable of performing his
14 past relevant work as a shipping and receiving clerk. *Id.* at 24. Consequently, the
15 ALJ concluded that plaintiff did not suffer from a disability as defined by the
16 Social Security Act. *Id.*

17 Plaintiff filed a timely request for review of the ALJ’s decision, which was
18 denied by the Appeals Council. *Id.* at 1-4, 12-13. The ALJ’s decision stands as
19 the final decision of the Commissioner.
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
26 1155-56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step
27 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
28 assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 III.

2 **STANDARD OF REVIEW**

3 This court is empowered to review decisions by the Commissioner to deny
4 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
5 Administration must be upheld if they are free of legal error and supported by
6 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
7 (as amended). But if the court determines that the ALJ's findings are based on
8 legal error or are not supported by substantial evidence in the record, the court
9 may reject the findings and set aside the decision to deny benefits. *Aukland v.*
10 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
11 1144, 1147 (9th Cir. 2001).

12 “Substantial evidence is more than a mere scintilla, but less than a
13 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such
14 “relevant evidence which a reasonable person might accept as adequate to support
15 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
16 F.3d at 459. To determine whether substantial evidence supports the ALJ's
17 finding, the reviewing court must review the administrative record as a whole,
18 “weighing both the evidence that supports and the evidence that detracts from the
19 ALJ's conclusion.” *Mayes*, 276 F.3d at 459. The ALJ's decision “cannot be
20 affirmed simply by isolating a specific quantum of supporting evidence.”
21 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
22 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
23 the ALJ's decision, the reviewing court “may not substitute its judgment for that
24 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
25 1992)).

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IV.

DISCUSSION

Plaintiff argues that the ALJ improperly discounted the opinion of treating physician, Dr. John Branch. P. Mem. at 2-5. Specifically, plaintiff contends that the reasons provided were legally insufficient.

In determining whether a claimant has a medically determinable impairment, among the evidence the ALJ considers is medical evidence. 20 C.F.R. § 404.1527(b). In evaluating medical opinions, the regulations distinguish among three types of physicians: (1) treating physicians; (2) examining physicians; and (3) non-examining physicians. 20 C.F.R. § 404.1527(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (as amended). “Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 404.1527(c)(1)-(2). The opinion of the treating physician is generally given the greatest weight because the treating physician is employed to cure and has a greater opportunity to understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

Nevertheless, the ALJ is not bound by the opinion of the treating physician. *Smolen*, 80 F.3d at 1285. If a treating physician’s opinion is uncontradicted, the ALJ must provide clear and convincing reasons for giving it less weight. *Lester*, 81 F.3d at 830. If the treating physician’s opinion is contradicted by other opinions, the ALJ must provide specific and legitimate reasons supported by substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide specific and legitimate reasons supported by substantial evidence in rejecting the contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a

1 non-examining physician, standing alone, cannot constitute substantial evidence.
2 *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v.*
3 *Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
4 813, 818 n.7 (9th Cir. 1993).

5 On February 17, 2012, Dr. Branch completed a standardized form titled:
6 Medical Opinion Re: Ability to Do Work-Related Activities (Physical). AR at
7 223-25. Dr. Branch indicated that plaintiff could occasionally lift and carry at
8 most less than ten pounds, and similarly, could frequently lift and carry at most
9 less than ten pounds. *Id.* at 223. During an eight-hour workday, plaintiff could
10 stand and walk for about six hours and could sit about six hours. *Id.* Dr. Branch
11 opined that plaintiff could not sit for more than 90 minutes without changing
12 positions and could stand for only 30 minutes before changing position. *Id.* Every
13 90 minutes plaintiff needs to walk around for 15 minutes. *Id.* at 224. Dr. Branch
14 cited to his physical exam of plaintiff and an MRI in support of his finding. *Id.*

15 The ALJ assigned less weight to Dr. Branch's opinion than to the opinions
16 of state agency medical consultants, finding that Dr. Branch's opinion was
17 "without substantial support from any objective clinical or diagnostic findings"
18 and therefore less persuasive. AR at 23. Moreover, the ALJ deemed Dr. Branch's
19 opinion "quite conclusory, providing very little explanation of the evidence relied
20 on in forming that opinion." *Id.* Finally, the ALJ found that Dr. Branch's opinion
21 was inconsistent with his own treating records. *Id.*

22 The ALJ's first reason for discounting Dr. Branch's opinion – that it lacked
23 substantial support from any objective clinical or diagnostic findings – does not
24 find support in the record. Dr. Branch stated that the results of a physical
25 examination and an MRI informed his opinion about plaintiff's limitations. *Id.* at
26 224. The physical examination results showed that plaintiff experienced
27 numbness in his right thigh; presumably this information is an expression of
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1 plaintiff's subjective complaints. *Id.* at 224. But the MRI presents objective
2 findings of plaintiff's lumbar degeneration. *Id.* at 187, 224. Therefore the court
3 finds that there was objective support for Dr. Branch's opinion and the ALJ's
4 erred with regard to this reason for discounting the opinion. But this error was
5 harmless, as the court finds the ALJ's remaining two reasons were specific and
6 legitimate and supported by substantial record evidence.

7 The second reason the ALJ provided for discounting Dr. Branch's opinion
8 was that the opinion was conclusory. *Id.* at 23. In support of the ALJ's finding,
9 the Commissioner cites cases holding that an ALJ may reject "check-off reports
10 that [do] not contain any explanation of the bases of" a doctor's conclusions.
11 *Molina v. Astrue*, 674 F.3d 1104, 1111-1112 (9th Cir. 2012); *see also Crane v.*
12 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (holding ALJ permissibly rejected
13 psychological evaluations "because they were check-off reports that did not
14 contain any explanation of the bases of their conclusions."). The questionnaire
15 that Dr. Branch completed here is a standardized form, but it is not fairly
16 characterized as "check box." There are areas instructing the doctor to provide
17 supporting reasoning and clinical findings, which, as noted above, Dr. Branch did,
18 but to a very limited extent. The ALJ did not characterize the form as check-box,
19 but rather fairly characterized it as conclusory and having little explanation. This
20 court cannot say that the ALJ erred in so characterizing the opinion, nor was it
21 improper for the ALJ to find it less persuasive than others for this reason.

22 The ALJ's third reason for discounting Dr. Branch's opinion is that his
23 opinion was inconsistent with his treating records, which indicated negative
24 straight leg raising tests and normal heel-toe walking. *Id.* at 23, 188-89. A
25 negative "straight leg raise test" – where a medical practitioner gently raises the
26 patient's leg upward while the patient is lying down and that action does not cause
27 the patient her typical pain – suggests a lack of nerve root irritation.

1 <http://meded.ucsd.edu/clinicalmed/joints6.htm> (last visited Dec. 10, 2014).
2 “Therefore, [a] negative test helps rule out nerve root irritation as cause of pain.”
3 *Id.* Plaintiff counters that the normal findings of these two tests are not
4 inconsistent with the limitations opined by Dr. Branch. Specifically, plaintiff
5 argues that these test results do not indicate that plaintiff’s “spinal impairment
6 imposes no functional limitations.” P. Mem. at 5. Plaintiff has at best made an
7 argument that the record supports more than one rational interpretation. Such an
8 argument is insufficient to show legal error because “[i]f the record would support
9 more than one rational interpretation, [the court] defer[s] to the ALJ’s decision.”
10 *Bayliss v. Barnhart*, 427 F.3d at 1214 n. 1 (9th Cir. 2005) (citation omitted).
11 Accordingly, the ALJ did not err when he concluded that Dr. Branch’s treatment
12 notes conflicted with his opinion regarding plaintiff’s limitations.

13 Because the ALJ provided two specific and legitimate reasons supported by
14 substantial evidence, the ALJ did not err in giving less weight to Dr. Branch’s
15 opinion.

16 V.

17 **CONCLUSION**

18 IT IS THEREFORE ORDERED that Judgment shall be entered
19 AFFIRMING the decision of the Commissioner denying benefits, and dismissing
20 this action with prejudice.

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22 DATED: December 19, 2014

23 
24 SHERI PYM
25 United States Magistrate Judge
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